

Australian Nursing and Midwifery Federation Submission to the

AUSTRALIAN GOVERNMENT CONSULTATION ON THE CARE AND SUPPORT SECTOR CODE OF CONDUCT

15 DECEMBER 2021



Australian
Nursing &
Midwifery
Federation



Annie Butler
Federal Secretary

Lori-anne Sharp
Federal Assistant Secretary

Australian Nursing and Midwifery Federation
Level 1, 365 Queen Street, Melbourne VIC 3000
E: anmffederal@anmf.org.au
W: www.anmf.org.au



INTRODUCTION

The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 300,000 nurses, midwives and carers¹ across the country.

Our members work in the public and private health, aged care and disability sectors across a wide variety of urban, rural and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, fulfil their professional goals and achieve a healthy work/life balance.

Our strong and growing membership and integrated role as both a professional and industrial organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

Through our work with members we aim to strengthen the contribution of nursing and midwifery to improving Australia's health and aged care systems, and the health of our national and global communities.

With regard to care of older people, ANMF members work across all settings in which aged care is delivered, including over 45,000 members who are currently employed directly in the aged care sector. Many more of our members are involved in the provision of health care for older persons who move across sectors (acute, residential, community and in-home care), depending on their health needs. Being at the forefront of aged care, and caring for older people over the twenty-four hour period in acute care, residential facilities and the community, our members are in a prime position to make clear recommendations to improve legislation that seeks to enhance the quality and safety of Australia's aged care system.

The ANMF welcomes the opportunity to provide feedback on the Care and Support Sector Code of Conduct Consultation Paper – November 2021 (the Code). Our submission makes comment on several key issues regarding the Code and associated issues.

¹ Carers, or 'personal care workers/PCWs' as named in this submission, refers to the currently unregulated workforce of assistants in nursing, care workers, or aged care workers, or however titled.



Developing and implementing a new Code can only occur following widespread sector reform as per the Royal Commission's recommendations

The ANMF argues that the current consultation has been rushed and must be revised considerably in terms of its scope and timeframe. The current consultation and draft Code do not appear to take sufficient account of how healthcare professionals are already regulated by the National Boards overseen by the Australian Health Practitioner Regulation Agency. The ANMF argues that a single overarching Code that attempts to regulate both providers and employees (including already regulated staff) represents significant overreach. It is the ANMF's view that at present the consultation team has not provided sufficient reassurance that all relevant existing regulators have been appropriately consulted and has not demonstrated the necessary appreciation of the complexity of proposing the development and implementation of a new universal Code without first addressing the widespread need for significant reform.

The ANMF argues that the first priority for aged care sector reform should not be the development and implementation of a new Code of Conduct. There are numerous reforms proposed by the Royal Commission that are necessary prior to development and adoption of a new Code. Further, the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability should also be completed and its recommendations considered prior to the development of a new Code.

Establishing and implementing the Code of Conduct would not effectively address the widespread failures and negligence that is rampant throughout Australia's aged care sector. A proposal to implement this Code of Conduct in haste by July 2022 without addressing the widespread reforms and legitimate concerns raised during consultation represents the same attitude that fails to address the appalling lack of staffing and skills mix in aged care.

The proposed Code would duplicate and overlap existing Codes for registered health professionals. Regulation of aged care workers should occur prior to implementation of the Code

The current consultation, in dealing only with worker screening and Code of Conduct aspects, will not address the totality of change required to ensure a skilled and competent aged care workforce that can deliver safe, high quality aged care. As a first step, the ANMF recommends that the consultation team complete thorough stakeholder consultation with existing regulatory bodies with a view to considering the regulation of aged care workers via AHPRA (as per Royal Commission Recommendation 77) before embarking on a project to develop a new Code.



Our proposals are not confined to personal care workers, but also include registered and enrolled nurses, nurse practitioners, and other registered health practitioners. Both registered and enrolled nurses and nurse practitioners (who are also registered nurses) are already subject to a registration scheme under the Health Practitioner Regulation National Law (the National Law), administered by the Nursing and Midwifery Board of Australia (NMBA)/ Australian Health Practitioner Regulation Agency (AHPRA). In order to practice as a registered or enrolled nurse, a person must be registered in accordance with the NMBA. In order to be eligible for registration, a person must have successfully completed an Australian Nursing and Midwifery Accreditation Council accredited program of study, approved by the NMBA. For a registered nurse, the approved program of study is a three-year Bachelor of Nursing degree and for an enrolled nurse, an eighteen-month Diploma of Nursing. Nurse practitioners must have also completed an additional approved Masters degree on top of their registered nurse education and gained significant experience in practice.

Both registered nurses and enrolled nurses must meet the NMBA's registration standards when first registering and renewing their registration. This includes scrutiny of any criminal history (including an international criminal history check), professional indemnity insurance, recency of practice, and continuing professional development. Both registered nurses and enrolled nurses are also required to comply with the NMBA professional standards, including the Codes of Conduct, and can be sanctioned for failure to meet the requisite standards. The existing registration scheme includes mechanisms for reporting misconduct, serious misconduct, and conditions that may impact a nurse's capacity to practice safely. Nurses found to have breached the code of conduct or to be otherwise unfit to practice are subject to sanctions, including imposing conditions on registration, suspension, or cancellation of registration.

The ANMF argues that it is not necessary to include health practitioners, who are currently subject to the National Law registration scheme, in the proposed Code of Conduct as these measures are already met, and exceeded, pursuant to the National Law. Inclusion of registered and enrolled nurses in applying a code of conduct in addition to the existing registration scheme, which includes the requirement to meet standards set in codes of conduct, would result in unnecessary duplication and regulatory burden. Similarly, the definition of governing person captures registered health practitioners, including registered and enrolled nurses.

The ANMF notes that the Government has not agreed to implement the Royal Commission's Recommendation 77 to regulate personal care workers through an Australian Health Practitioner Regulation Agency (AHPRA) model. We argue that an important feature of ensuring the capacity and capability of the aged care workforce to deliver safe, quality care is to establish a registration scheme for unregulated aged care workers. The ANMF strongly recommends that care workers must be subject to a registration scheme.



Regulation through registration of care workers will provide greater opportunity for care workers to articulate into nursing and other health professional qualifications as well as into higher level certificate qualifications and relevant training packages. The ANMF considers that the benefits of aligning registration of care workers with the nursing profession will ensure they are subject to investigation and sanction if reported for failing to meet conduct standards and provide an enhanced layer of protection for the public, than simply implementing a Code of Conduct would provide.

The ANMF foresees the potential for significant regulatory complications for nurses in aged care if they are included in this proposed Code of Conduct. The proposed system would make nurses and other health professionals employed in aged care settings more highly regulated than most other health practitioners while taking on an enormous and disproportionate degree of personal financial risk in circumstances where there is no clear, due process for decision-making.

The ANMF argues that the proposed Code of Conduct and its development has little regard or understanding of the arrangements that are already in place for the regulation of nurses through Australia's existing National Registration and Accreditation Scheme (NRAS). Nor is there any acknowledgment of the varying state-based Codes of Conduct for unregistered health workers, including assistants in nursing, and personal care workers (however titled), and any state-based legislation that applies to complaints made about workers in those jurisdictions.

Given that the current state-based processes incorporate unregistered health workers in sectors other than aged care (and so would not be replaced in any way by this Code of Conduct), the ANMF submits that the proposed Code would effectively create duplicate processes and powers. As an example of the issues this Code will create in jurisdictions, in the New South Wales context, the Health Care Complaints Commission has the power to assess, investigate and make a finding and orders (e.g., prohibition order, public statement) in relation to complaints about (unregistered) health care workers. A prohibition order is effectively the same as a banning order.

The Health Care Complaints Commission also has the power to assess, investigate, and prosecute complaints against registered health practitioners in consultation with the applicable health professional council (e.g., the Nursing and Midwifery Council of NSW). The draft Code lacks regard for these processes that occur within NRAS and associated co-regulatory models. The ANMF therefore considers that the Code creates an additional (and additionally punitive) process that the worker would be subjected to in response to a complaint.



Under the proposed duplicate regulatory system, there does not appear to be any mechanism for the transfer of information between regulators where both are undertaking an investigation into the same complaint. The current draft Code would appear to create the possibility where two regulators could be tasked with considering the same complaint with these processes yielding either conflicting outcomes or, alternatively, where one regulator's decision could potentially prejudice another's decision.

Workers failing to comply with the Code of Conduct resulting in banning orders

As stated above, unregistered health care workers, including personal care workers in aged care are already subject to a requirement to comply with a Code of Conduct for unregistered health practitioners in many jurisdictions e.g., Schedule 3 of the *Public Health Regulation 2012*.

The ANMF submits that the introduction of the aligned Code of Conduct will mean that any nurse or unregistered health worker in aged care would be subject to three different Codes of Conduct. The second being either the Code of Conduct for nurses/Code of Conduct for unregistered health practitioners and the third being the Code of Conduct of their employer. The overlap and duplication will no doubt create confusion which may lead to compliance issues.

The ANMF highlights that the process/scheme outlined in the Bill introduced in response to the Royal Commission only refers to outcomes for contraventions of the proposed Code of Conduct, but does not have any reference to the process to be undertaken in determining the contravention, nor a proposed Code of Conduct to provide feedback on.²

The ANMF submits that a large proportion of unregulated staff in aged care do not have English as their primary language. Although it is important at implementation to ensure that any Code is distributed in a sufficient variety of community languages, the ANMF highlights the concern that for people who have English as an additional language, there may be barriers to being afforded procedural fairness in this process.

The ANMF submits significant concerns that in its current form, the Code includes no reference to any assessment or investigation processes that may lead to the making of a banning order. Further, there does seem to be any need for a nexus between the conduct alleged and the provision of aged care. The Code includes little to no guidance or information about how a banning order (however made) would impact upon someone's registration or whether being subject to a banning order could be sufficient grounds for a state-based prohibition order (in the case of unregistered health workers). It is fundamental to ensure procedural fairness is maintained where decisions that so significantly affect the lives and livelihood of workers are made.

² Parliament of Australia. Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021. Online: Australian Government. 2021. Available: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6778



The Aged Care Quality and Safety Commission is not a suitable organisation to administer the Code

Based on the past performance of the Aged Care Quality and Safety Commission (ACQSC) and its predecessors which have failed to administer the Aged Care Quality Standards and provide adequate protection to the public as evidenced during the Royal Commission, the ANMF argues that the ACQSC is neither sufficiently qualified nor resourced to perform the function of an Australian Health Practitioner Regulation Agency (AHPRA)-like licensing and registration body responsible for monitoring, investigating, and in some cases banning workers and providers.

The National Disability Insurance Scheme is not a suitable template for the Code

The ANMF argues that the proposed Code does not appear to adequately account for the existing national Code of Conduct for health care workers and the Codes of Conduct published by each National Board for registered health professionals which are all more detailed and comprehensive. This may result in unnecessary duplication, overlap, and confusion.

The ANMF notes that the brief National Disability Insurance Scheme (NDIS) Code of Conduct is not fit for purpose and has not improved the monitoring and observation of care delivery in the disability care sector. Clients of the NDIS have experienced appalling mistreatment by both the providers and care workers most shockingly demonstrated in the South Australian case of Miss Ann Marie Smith. Other failures of the NDIS system have also been revealed in evidence being heard in the Disability Royal Commission. This reinforces our position that a Code of Conduct alone does not prevent poor quality service and care. The ANMF argues that a cross-sector Code would not be effective and is an inappropriate and overly ambitious proposed solution at this time.



CONCLUSION

The ANMF is pleased for the opportunity to submit to this consultation but wishes to affirm our position that at present the development of an overarching Code of Conduct for the aged care sector is unnecessary and unlikely to be effective particularly due to the real risk of duplication, overlap, and confusion between multiple existing and effective Codes – particularly those of registered health professionals including nurses.

Implementing a Code of Conduct in the absence of implementing the contingent reforms required to support its operation and success including but not limited to ensuring safe staffing levels and skills mixes in residential aged care sets the sector and its workers up for failure. As evidenced by the Royal Commission in its final report,³ if the proposed Code were operational today, it would be breached daily simply because more than half of all residential aged care facilities are staffing well below the recommended levels to deliver even adequate care to their residents. Codes of Conduct do not stand alone. To strengthen protections for consumers of aged and support services, and for the Code of Conduct to be successfully implemented, it will require the full suite of components as listed in Aged Care Worker Regulation Scheme – Final Report Page 43.⁴ Critical components include but are not limited to; definition of roles and scope of practice; English proficiency standards; nationally consistent minimum education and training; licensing and registration. As documented in the Aged Care Worker Regulation Scheme Final Report in 2020 there is an urgent a need for a worker regulation scheme for personal care workers.⁵

3 Royal Commission into Aged Care Quality and Safety. Final Report: Care, Dignity and Respect. Online: Commonwealth of Australia. 2021. Available: <https://agedcare.royalcommission.gov.au/publications/final-report>

4 Australian Government Department of Health. Aged Care Worker Regulation Scheme Final Report (Updated 21 May 2021). Online: Australian Government Department of Health. 2020. Available: <https://consultations.health.gov.au/aged-care-reform-compliance-division/aged-care-worker-regulation-scheme-consultation/>

5 Australian Government Department of Health. Aged Care Worker Regulation Scheme Final Report (Updated 21 May 2021). Online: Australian Government Department of Health. 2020. Available: <https://consultations.health.gov.au/aged-care-reform-compliance-division/aged-care-worker-regulation-scheme-consultation/>